92-562

Supreme Court, U.S.
FILED
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NO.

IN THE
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Respondent,

-against-

STANLEY CAMING,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the requirement in the penalty provision of 31 U.S.C. § 5322 that the defendant "willfully" violated a provision of the subchapter requires the government to prove that the defendant intentionally violated a known legal duty in a prosecution for structuring currency transactions in violation of 31 U.S.C. § 5324.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STANLEY CAMING,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Stanley Caming respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, entered on June 29, 1992.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 968 F.2d 232, and is reproduced in the Appendix at A1-A18. The opinion of the United States District Court for the Southern District of New York, denying the petitioner's motion to suppress evidence, is reported at 756 F. Supp. 121 (1991), and is reproduced in the Appendix to this Petition at A19-28.

JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on June 29, 1992.

STATUTES INVOLVED

31 U.S.C. § 5322 provides in pertinent part:

> (b) Any person willfully violating this subchapter or a regulation prescribed under this subchapter . . . while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 10 years, or both.

31 U.S.C. § 5324 provides in pertinent part:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction-
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); . . . or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more financial institutions.

31 U.S.C. § 5313 provides in pertinent part:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

STATEMENT OF THE CASE

On August 27, 1990, petitioner Stanley Caming, was charged in a two-count indictment with structuring financial transactions in violation of Title 31 U.S.C. § 5324.

At his jury trial, the government's case consisted of documentary and testimonial evidence that Mr. Caming had structured an aggregate total of more than $700,000 in cash transactions over a 16-month period to avoid triggering the requirement of 31 U.S.C. § 5313(a) that financial institutions file currency transaction reports (CTRs) informing the government of all transactions of currency and monetary instruments in excess of $10,000. Mr. Caming made more than eighty cash deposits, totalling $675,000, into several accounts he opened in real or fictitious names at various banks in New York City. None of these deposits were for more than $10,000. During this period, Mr. Caming also made five withdrawals from these accounts, each for between $9,000 and $10,000.

Mr. Caming's defense was that the money he had deposited had been invested in various family accounts for several years and were not the proceeds of any illicit activities nor a

money laundering operation. In addition, Mr. Caming's sister testified that she and her brother had not been on speaking terms since 1985, and had been embroiled in a bitter dispute over their mother's money and their expected inheritance from her. Mr. Caming had claimed that he was entitled to reimbursement from the potential estate for funds he had laid out for their mother's care. Mr. Caming's deposits into the fictitious accounts was nothing more than his attempted concealment of family money from his sister. In short, the defense contended that while the deposits may have been structured to avoid triggering the bank's reporting requirements, any structuring was done without knowledge of its illegality and was motivated by purely personal concerns and not to serve any illegal business.

Mr. Caming requested that the court charge the jury that the government was required to prove "that the defendant knew that his structuring of these currency transactions was unlawful." The court instructed that "you do not need to find that the defendant knew that structuring was unlawful in order to find that he acted knowingly and willfully for the purposes of this element."

The jury thereupon returned a verdict of guilty on both counts.

REASON FOR GRANTING THE WRIT

THE SECOND CIRCUIT AND OTHER COURTS OF APPEAL HAVE FORMULATED AN UNWARRANTED AND DANGEROUS DEPARTURE FROM THE TRADITIONAL DEFINITION OF THE TERM "WILLFULLY" IN CRIMINAL PROSECUTIONS

A. Introduction

Congress enacted the substantive anti-structuring statute under which Mr. Caming was convicted, 31 U.S.C. § 5324, in 1986. In the face of virtually unanimous judicial interpretation of a "willfulness" requirement in a criminal statute as meaning intent to violate the law, Congress chose not to amend the already-existing "willfulness" requirement in the penalty provision of § 5322. Nevertheless, the Second Circuit and three other courts of appeal have departed from the traditional definition of the statutory term, only insofar as it is applicable to structuring prosecutions, with a far more narrow and harsh construction than that employed in cases involving violations of other currency reporting provisions. No longer is knowledge of the unlawfulness of one's actions required, it suffices that the defendant purposefully avoided the filing of CTRs by depositing or withdrawing money in increments smaller than $10,000.

In relaxing the government's burden in a structuring prosecution, this recent line of cases has cast a wide net that ensnares the unwary, legitimate businessperson as well as the drug profiteer or money launderer. In an era in which politicians complain of "big government" and boast that they are opposed to excessive regulation, privacy-minded individuals might choose to handle financial transactions in a manner that reduces the potential for unwelcome governmental scrutiny. When not combined with shielding taxable income or laundering illicit profits, such measures are not inherently immoral acts that can be punished in the absence of knowledge that they are unlawful. Congress intended this law to be used to detect criminals dealing in large amounts of cash, not

to create a new class of criminals from the ranks of law-abiding citizens.

While no conflict between circuits has yet developed on this issue, its eventual resolution by this Court is almost a certainty. In *United States of America v. Aversa*, 762 F. Supp. 441 (D.N.H. 1991) the United States District Court for the District of New Hampshire held that knowledge of the proscription against structuring is an essential element of a structuring prosecution. Oral argument on an appeal in that case is scheduled before the First Circuit on October 9, 1992. There does not appear to be any advantage to delaying consideration of the issue while additional circuits decide it without adequate guidance that only this Court can provide.

B. Previous Interpretations of "Wilifully" in Criminal Statutes

In virtually every area of criminal law, the element of willfulness has been interpreted to require a bad purpose or evil motive rather than a voluntary and purposeful commission of an act prohibited by the statute. Thus well over a century ago, in *Felton v. United States*, 96 U.S. 699, 702 (1877) this Court considered a statute regulating the distillation of spirits that provided for criminal penalties if the distiller "knowingly and wilfully" violated its provisions. Finding that a violation of the law was indeed knowing and voluntarily, it nevertheless refused to hold such conduct criminal because it was "innocent in purpose," and therefore not "wilfull." In *Spurr v. United States*, 174 U.S. 728, 734-735 (1898) and *Potter v. United States*, 155 U.S. 438, 446 (1894), the Court applied similar reasoning to statutes prohibiting the certification of checks upon insufficient funds. "The wrongful intent is the essence of the crime." *Spurr*, 174 U.S. at 735.

In *United States v. Murdock*, 290 U.S. 389, 394 (1933), the Court reaffirmed that "when used in a criminal statute ['willfully'] generally means an act done with a bad purpose," and where an "act declares a willfull failure to observe the directions

a penal offense, an evil motive is a constituent element of the crime." *Id.* at 395.

In subsequent decisions, this Court has refined the definition of willfulness. In *United States v. Bishop*, 412 U.S. 346, 360 (1973), "willfully" was defined as "a voluntary, intentional violation of a *known legal duty*" (emphasis added), a construction reaffirmed in *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam), and *Cheek v. United States*, ___ U.S. ___, 111 S. Ct. 604, 610 (1991). Thus, this Court has consistently interpreted the "willfulness" element of a criminal statute as requiring proof of intention to break the law.

In *Cheek, supra*, this Court held that its traditional definition of "willfulness" applied to all tax statutes, even with respect to the well-known obligations to file a tax return and declare wages as income. In fact, the Court held that not only must the government prove that the defendant knew he was violating the law, but the defendant's honest belief that he was not required to file a tax return or declare wages as income, no matter how objectively unreasonable, constituted a valid defense to prosecution.

While *Murdock, Bishop, Pomponio*, and *Cheek* all involved interpretation of federal criminal tax statutes, recent cases have almost universally employed a similar construction of willfulness in other areas of criminal law. In a prosecution for misapplication of government funds, the Ninth Circuit has stated:

> *In a criminal statute, 'willfully' generally means the voluntary, intentional violation of a known legal duty* in bad faith or with evil purpose . . . . A general intent to commit the proscribed act is not enough; a specific intent to do something the law forbids is required."

United States v. Garcia, 751 F.2d 1033, 1035 (9th Cir. 1985) (emphasis added), *citing Pomponio, supra*, 429 U.S. at 11-12 and *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). *See also United States v. Marvin*, 687 F.2d 1221, 1228 (8th Cir.

1982), *cert. denied*, 460 U.S. 1081 (1983) (in prosecution for violation of misappropriation of food stamps, "[t]he defendant could not be convicted . . . unless he acted 'willfully,' and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law"); *United States v. Wells*, 766 F.2d 12, 20 (1st Cir. 1985) ("Willfulness means 'committed voluntarily and with purpose of violating the law, and not by mistake, accident or in good faith' . . . . Willfulness means having the specific intent to do something the law forbids; a general intent to commit the proscribed act is not enough"); *United States v. Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986) (in contempt prosecution, "'[w]illfulness' is defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful").

In 1970, Congress enacted the Bank Secrecy Act, which *inter alia* required banks to report currency transactions in excess of $5000 (now $10,000, *see* 31 U.S.C. § 5313(a); 31 C.F.R. § 103.22(a)(1) (1989)), and also required the filing of a currency report by any individual who imports or exports more than $5,000 (now $10,000) across the United States border. 31 U.S.C. § 5316. These reporting requirements were intended to assist law enforcement authorities as "the deposit and withdrawal of large amounts of currency . . . under unusual circumstances may betray a criminal activity." H.R. Rep. No. 975, 91st Cong., 2d Sess., reprinted in U.S.Code Admin.News 4394, 4396.

The penalty provision for the statute, § 5322, specifies that one who "willfully violates" a provision of the subchapter commits a crime. The word "willfully" as it appears in § 5322, uniformly has been held to require proof of the defendant's intent to violate his known legal duty to file a customs report when applied to § 5316 prosecutions for transporting currency across the border without filing such a report, *see, e.g., United States v. Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984); *United States v. Dichne*, 612 F.2d 632 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); *United States v. Chen*, 605 F.2d 433 (9th Cir. 1979); *United States v. Granda*, 565 F.2d 922 (5th Cir. 1978), or § 5313 prosecutions of financial institutions for failing to file CTRs. *See, e.g., United*

States v. Bank of New England, 821 F.2d 844, 854, 857 (1st Cir. 1987). Until the application of § 5322 to anti-structuring prosecutions, no reported decision had held that the statute's willfulness requirement necessitated anything less than proof of the defendant's knowledge of the unlawfulness of his actions.

C. The Interpretation of "Willfully" as Applied to the Anti-Structuring Statutes

Prior to the enactment of anti-structuring laws, the government initiated prosecutions of individuals who engaged in structured transactions "either for willfully causing a financial institution to fail to file a CTR, see 18 U.S.C. § 2(b), for knowingly and willfully concealing a material fact from the government, 18 U.S.C. § 1001, or for conspiracy, 18 U.S.C. § 371." *United States v. Scanio*, 900 F.2d 485, 488 (2d Cir. 1990). The circuits were split on whether such conduct constituted a crime, some affirming convictions, *see, e.g., United States v. Heyman*, 794 F.2d 788, 790-93 (2d Cir. 1986), *cert. denied*, 479 U.S. 989 (1986); *United States v. Thompson*, 603 F.2d 1200, 1202-04 (5th Cir. 1979); others rejecting the approach, *see, e.g., United States v. Larson*, 796 F.2d 244, 246-47 (8th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 682 (1st Cir. 1985); and at least one announcing apparently contradictory decisions, *compare United States v. Tobon-Builes*, 706 F.2d 1092, 1096-1101 (11th Cir. 1983) and *United States v. Denemark*, 779 F.2d 1559, 1563 (11th Cir. 1986).

In response to these inconsistent results, Congress, as part of the Anti-Drug Abuse Act of 1986, enacted 31 U.S.C. § 5324, which provides that: "No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction . . . (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." 31 U.S.C. § 5324. This legislation was enacted years after the manifestation of judicial unanimity on the interpretation of § 5322's "willfully" as requiring proof of knowledge of illegality, *see Granda, supra* (1978);

Dichne, supra (1979); *Chen, supra* (1979). In enacting § 5324, Congress chose not to amend the already-existing "willfulness" requirement.

Yet, despite the long-standing uniform interpretation of § 5322's willfulness requirement as necessitating proof of the defendant's knowledge that his actions were unlawful, the Second Circuit, in *United States v. Scanio,* 900 F.2d 485 (2d Cir. 1990), held that such proof was not required in applying § 5322 to a structuring prosecution. The Court declared that Congress had adequately protected "unwary bank customers by requiring proof that they knew of, and intended to evade, the reporting provision -- rather than by requiring proof that they knew that structuring is unlawful." 900 F.2d at 491.

The *Scanio* Court acknowledged the inconsistency of its interpretation of § 5322 with previous interpretations, and explained:

> [U]nlike § 5316 which requires individuals to report otherwise innocent transactions, § 5324 (3) prohibits purposeful conduct aimed at defeating the government's right to information. Where a defendant is charged with violating an obscure reporting provision, proof that (s)he was specifically aware of the reporting provision is necessary to establish criminal intent. With respect to a prosecution for structuring, however, the requirement that a defendant be shown to have acted with a "bad purpose" is satisfied by proof that (s)he (1) knew that the bank was legally obligated to report currency transactions exceeding $10,000 and (2) intended to deprive the government of information to which it is entitled.

Id. at 490, 491. The court, however, did not explain why the government was no longer required to prove violation of a known legal duty, that is, the duty not to structure transactions.

As support for its unprecedented harsh construction of "willfully," the *Scanio* court cited dicta in an opinion in a civil

case, *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir. 1925): "a requirement that the conduct be 'willful' generally 'means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'" *American Surety* was decided eight years before this Court's decision in *Murdock* formulated an entirely different construction of "willfulness" in the context of criminal tax cases, engendering a steady flow of cases applying a similar construction in non-tax criminal prosecutions.

Following the lead of *Scanio*, other circuits also have held that unlike other interpretations of "willfully" as used in § 5322, that statutory term does not require proof of intent to break the law in a structuring prosecution. *See, United States v. Rogers*, 962 F.2d 342 (4th Cir. 1992); *United States v. Brown*, 954 F.2d 1563, 1568 (11th Cir. 1992); *United States v. Dashney*, 937 F.2d 532, 538-39 (10th Cir.), *cert. denied*, 112 S. Ct. 402 (1991); *United States v. Hoyland*, 914 F.2d 1125, 1129 (9th Cir. 1990). Each of the four cases cited *Scanio* as support for its position, and three of the four invoked the outdated pre-*Murdock* decision of *American Surety*; the fourth, *Rogers*, simply relied on the other three as well as *Scanio*. Thus, the entire line of cases establishing a markedly reduced burden of proof on the government tenuously rests on dicta from a 1925 civil decision and ignores the immense counterweight of this and lower federal courts for over a century.

To date, no court of appeals has decided this issue differently from *Scanio*. However, in *United States of America v. Aversa*, 762 F. Supp. 441 (D.N.H. 1991), the court rejected this trend favoring conviction in the absence of a culpable mental state. At a co-defendant's trial, the court originally had instructed the jury in accordance with *Scanio*, that it should not consider whether the defendant knew he was breaking the law. Following that defendant's conviction, this Court handed down its *Cheek* decision. Reviewing a motion to vacate the conviction in light of *Cheek*, the court reversed its position and held that guilty knowledge is required to sustain a structuring conviction. The court found no basis on which to restrict *Cheek* to tax prosecutions and not to apply it to the tax-related currency reporting statutes, whose

obligations are "more difficult and less common [to understand] than understanding ones duty to file a tax return." *Id.* at 447.

The *Aversa* court also criticized the *Scanio* interpretation of "willfully" as violative of the rule that "all words and provisions of a statute are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous." *United States v. Ven-Fuel,* 758 F.2d 741, 751, 752 (1st Cir. 1985); *see also Colantti v. Franklin,* 439 U.S. 379, 392 (1979). The *Aversa* Court explained:

> In the present case, § 5324 applies to structuring 'for the purpose of evading the reporting requirements.' 31 U.S.C. § 5324 (emphasis added). In order to do that one must know that the reporting requirements exist. If one follows the reasoning of *Scanio* that the 'willfulness' requirement of § 5322 is satisfied by knowledge of the reporting requirements and nothing more, then there is no difference between 'willfully violating' § 5324 and 'violating' § 5324. Only 'willful' violations of § 5324 are made criminal by § 5322. The only way that 'willful' has any meaning in this context is if it means a specific intent to violate the law.

Id. at 448.

D. The Writ Should be Granted

This Court should grant the writ of *certiorari* to correct the erroneously decided *Scanio* line of cases, which represent a dangerous and unwarranted trend departing from the traditional Anglo-Saxon notion that only those with a guilty mind be punished. Based on the theory that an individual's attempt to prevent the government from receiving information to which it is entitled is a sufficient *mens rea* to sustain a structuring conviction, *Scanio* and its progeny ignore the fact that mere avoidance of potentially burdensome government regulation need not connote any bad purpose or evil motive. Structuring simply is not an act

that is *malcum in se* like the "biblical" crimes of murder, rape, and robbery.

One can think of many examples of "legal" structuring designed to maximize advantage to the individual at a cost to the government. One may structure payment of business expenses or receipt of income to minimize tax liability for a particular year. To reduce shore-term tax liability, athletes may contract to structure their salary, which is compensation for the use of their athletic skills, to include payouts long after they retire. Even in the context of currency reports, in fact, some structuring is still allowed. For example, it is permissible for an individual to transport a large sum of cash across a border without (filing a Customs report by making numerous trips,) each carrying less than $10,000, or travelling with other persons (thus multiplying the $10,000 limit by the number of persons travelling), or both.

Indeed, the facts of *Scanio* itself dramatize the unfairness of prosecuting those ignorant of the anti-structuring law. In *Scanio*, the defendant attempted to pay off a $13,000+ line of credit with cash. When informed that the teller would have to file a CTR, the defendant chose instead to pay $9500 and told the bank teller that he would return the following day to pay the remainder. When he did so, the teller agreed that no CTR would be filed because the transaction was consummated over two days. Nevertheless, Scanio was arrested for structuring. Scanio's willingness to confide his intention to the teller, and her accommodating attitude, are convincing manifestations of the apparent legality of structuring to those unaware of the newly enacted provision.

The *Aversa* court's objection to *Scanio* that it literally writes the willfulness requirement out of the statute is also well taken. Under *Scanio*, the term is perfectly superfluous, since it means no more than acting for the purpose of avoiding the bank filing of CTRs, (already an element of § 5324.) In enacting § 5324, Congress chose not to delete the term "willfully" from § 5322, which had been consistently interpreted for many years as requiring knowledge of unlawfulness. Congress thought that the

reporting requirements of Title 31 were sufficiently obscure and complex that the "willfulness" requirement should remain unchanged. The courts have no jurisdiction to review that decision, and the *Scanio* interpretation that Congress intended that "willfulness" require proof of violation of a known legal duty with respect to some, but not all, of the subchapter's prohibitions, is entirely implausible.

Neither *Scanio* nor any of its progeny have provided a convincing explanation for treating the willfulness requirement of § 5322 so differently in structuring prosecutions than in its applications to other provisions in the same subchapter. *Scanio* labels § 5316 an "obscure reporting requirement" that "requires individuals to report otherwise innocent transactions," but finds that § 5324 prohibits "purposeful conduct aimed at defeating the government's right to information." 900 F.2d at 491. This distinction ignores common sense. Section 5316, on its face and without reference to regulations, requires the filing of Customs reports for import/export of significant amounts of currency, is actually less obscure than the more complicated statutory and regulatory framework of § 5324. The very definition of "structuring" is defined by regulation rather than statute 31 C.F.R. § 103.11.[1] Nevertheless, the government is requir to prove that a defendant caught secreting one million dollars i cash in a suitcase compartment for travel to a foreign destinatic n knew his actions were illegal; their burden is considerably less in prosecuting an individual for depositing $11,000 of legitimately earned money into a bank account on two successive days. Such a result undermines public confidence in the criminal justice system and could not have been the intent of Congress.

Moreover, the Second Circuit's refusal in the instant case to revisit the *Scanio* opinion in light of *Cheek* was ill-advised. Nothing in *Cheek* suggests that its analysis be confined to tax cases

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[1] Even the Treasury Department acknowledged by implication the obscurity of this anti-structuring provision when it proposed (but failed to adopt) regulations to publicize it. *See* 53 Fed. Reg. 7,948 (1988), 54 Fed. Reg. 20,398 (1989).

alone. Indeed, the Court stated that Congress itself "softened the impact of the common-law presumption [of knowledge of the law] by making specific intent to violate the law an element of certain federal criminal tax offenses." *Cheek*, 111 S.Ct. at 609. This apparently was accomplished by the inclusion of a "willfulness" requirement no different from the one included in § 5322.

Moreover, the reliance by the court of appeals on several cases that supposedly "refused to apply *Cheek* to the willfulness element of non-tax criminal statutes" is misplaced. *See* A15 of Appendix hereto. The First Circuit had already vacated its decision in *United States v.Donovan, supra*, and ordered a rehearing *en banc*. *See* above at 6. In *United States v. Chaney*, 964F.2d 437 (5th Ch. 1992), where the defendant was convicted of making false bank records, even if the court refused to apply the *Cheek* subjective intent defense, the defendant nevertheless violated a known legal duty, thus satisfying the traditional definition of "willfulness." In *United States v. Gay*, 967 F.2d 322, 327 (9th Cir. 1992), the court also refused to apply *Cheek*, but did so expressly because the federal mail and property fraud statues, 18 U.S.C. §§ 1341, 2314, do not contain a willfulness requirement. Thus, none of these cases are on point here, where Mr. Caming's defense is that he was unaware of his legal duty not to structure. Under *Cheek* and the *Scanio* cases, a defendant's honestly held belief that he need not file a tax return is a valid defense to prosecution, but a defendant's far more plausible ignorance of the obscure anti-structuring law is not; both results rely on the interpretation of virtually identical statutory "willfulness" requirements.

Requiring the government to prove guilty knowledge would not be unduly burdensome or prejudice the prosecution of the legitimate criminal targets of the legislation. Just as Customs forms publicize the reporting requirement for import/export of currency, banks could be required to print a similar warning on deposit slips, teller windows, automatic teller machines, etc. The fight against drug proliferation, no matter how laudable, does not justify criminalization of innocent, otherwise non-criminal attempts to avoid unnecessary governmental intrusion into private business

affairs, especially where publication of the recently enacted proscription of such acts could be so easily effected.

At the very least, the statutory language is ambiguous, invoking the rule of lenity in criminal prosecutions. This "longstanding principle[ ] ... demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, ___U.S.___, 110 S.Ct. 1979, 1985 (1990) (citation omitted). A "'time-honored interpretive guideline'[, the rule of lenity] serves to insure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts define criminal liability. *Crandon v. United States*, ___U.S.___, 110 S.Ct. 997, 1002 (1990) (citations omitted). While the Second, Fourth, Tenth and Eleventh Circuits have struggled mightily to justify a much harsher application of § 5322's "willfully" to prosecutions under § 5324 than those under § 5313 or § 5316, any suggestion that Congressional intent to impose such different constructions on the same word is clear on its face borders on the absurd.

In the instant case, the government adduced no evidence that the funds deposited and withdrawn by the petitioner were the proceeds of any illegal business, nor could the government disprove the defense contention that the petitioner had been using money legitimately accumulated by his family over a number of years. Mr. Caming was entitled to have the jury consider his defense that he was unaware of the criminal nature of his actions, and that he was motivated by purely personal and family concerns in trying to prevent a paper trail of his legitimate assets in the event of potential litigation. Instead, the jury was instructed to effectively disregard this defense. It appeared to Mr. Caming that by structuring his transactions, he was employing a legitimate strategy not unlike others employed in tax and tax-related matters.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted and the judgment of the court of appeals summarily reversed. Alternatively, the matter should be set down for full briefing and argument to resolve the important conflict in the lower courts concerning the application of *Cheek* to the statutory structuring prohibition.

Respectfully submitted,

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Dated: White Plains, New York
September 24, 1992

UNITED STATES OF AMERICA, Appellee,

-against-

STANLEY CAMING, Defendant-Appellant.

Docket No. 92-1043

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

968 F.2d 232

May 19, 1992, Argued
June 29, 1992, Decided

PRIOR HISTORY: Appeal from a conviction and sentence in the United States District Court for the Southern District of New York (Kram, J.), on one count of structuring currency transactions to avoid currency transaction reporting, in violation of 31 U.S.C. §§ 5322(b) and 5324(3), and one count of causing and attempting to cause financial institutions to fail to file currency transaction reports, in violation of 31 U.S.C. §§ 5322(b) and 5324(1).

DISPOSITION: Affirmed.

COUNSEL: DAVID A. CUTNER, New York, New York (CLIFFORD A. RATHKOPF, JR. and DEBRA I. HARRIS, of Counsel), for Defendant-Appellant Stanley Caming.

ROBERT E. RICE, Assistant United States Attorney, Southern District of New York, New York, New York (OTTO G. OBERMAIER, United States Attorney, BRUCE G. OHR and MICHELE HIRSHMAN, Assistant United States Attorneys, of Counsel), for Appellee, United States of America.

JUDGES: Before: PRATT, FRIEDMAN,[1] and ALTIMARI, Circuit Judges.

OPINION BY: DANIEL M. FRIEDMAN

OPINION: FRIEDMAN, Circuit Judge:

In this appeal from his conviction for structuring currency transactions, the appellant contends that the district court erroneously (1) denied his pretrial motion to suppress evidence, (2) denied him a fair trial through certain evidentiary rulings, (3) instructed the jury concerning an element of the offense, and (4) calculated his sentence under the Sentencing Guidelines. We reject all these contentions and affirm the conviction and sentence.

I

After a jury trial in the United States District Court for the Southern District of New York, the appellant Caming was convicted (on two counts) of (1) structuring currency transactions to avoid currency transaction reports, in violation of 31 U.S.C. §§ 5322(b) and 5324(3), and (2) causing and attempting to cause financial institutions to fail to file currency transaction reports in violation of 31 U.S.C. §§ 5322(b) and 5324(1). He was sentenced to 24 months in prison, followed by two years of supervised release, and the mandatory $ 100 assessment was imposed.

The evidence supporting the jury verdict, the sufficiency of which is not challenged, shows that over a 16-month period Caming structured more than $ 700,000 in cash transactions to avoid the requirement of 31 U.S.C. § 5313(a) that financial institutions report all currency transactions of more than $ 10,000. During that period, he made more than eighty separate cash deposits, totalling $ 675,000, into nine accounts he opened in real or fictitious names at six banks in New York City. Caming used false Social Security numbers for these fictitious accounts and

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[1] DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

opened a post office box, to which he held the key, in one of those fictitious names.

All of these deposits were for less than $ 10,000, but frequently for more than $ 9,000. On occasion Caming made multiple deposits, each for less than $ 10,000, but which totalled more than $ 10,000, on the same day. During this period, he also made five withdrawals from these accounts, each for between $ 9,000 and $ 10,000.

The government's proof included numerous financial records, bank deposit slips and other bank records, and testimony. A teller and a bank manager testified that Caming attempted on one occasion simultaneously to make two cash deposits that together amounted to more than $ 10,000, and that he left without making the deposits when he was told that the bank would have to file a currency transaction report based on the transactions. Two bank managers testified that signs informing bank customers of the $ 10,000 currency transaction reporting requirement and the criminal penalties for structuring a transaction to avoid those requirements were displayed at the branch during the period when Caming was depositing funds into the accounts. These witnesses further testified that a sign that Caming was looking at in two bank surveillance photographs was such a sign. The government also introduced bank surveillance photographs of Caming conducting transactions at a particular bank, the dates and times of which coincided with the dates and times that he made deposits into several accounts there.

II

Caming contends that the district court improperly denied his pretrial motion to suppress evidence seized from his automobile upon and shortly following his arrest while driving. According to Caming, the government delayed arresting him to enable it to seize evidence from his automobile. The district court correctly rejected this contention. Although Caming requested an evidentiary hearing on his motion to suppress, the district court denied the request because the court found that "the material facts are not in dispute."

A. The facts relating to Caming's arrest, as set forth in uncontradicted affidavits of Stephen D. Pinzino, the Internal Revenue Service agent in charge of the investigation, and of Caming, are as follows:

On Friday afternoon, Pinzino obtained a warrant to arrest Caming. At approximately 5:00 a.m., the following Monday, Pinzino and three other agents of the Internal Revenue Service stationed themselves outside of the apartment building in Manhattan where Caming lived. The agents decided to try to arrest him when he left the building. They made that decision because (1) the agents were unfamiliar with Caming's apartment, (2) it is safer to make an arrest in an open area than in an apartment and (3) during their surveillance of Caming, they had observed his wife, "who appeared frail and not in good health" and who they believed "would have had great difficulty watching her husband's arrest."

After waiting approximately three-and-a-half hours, during which Caming did not appear, the agents checked the garage in the building and discovered that his car was not there. The agents then proceeded to an athletic club in Brooklyn, where they had surveilled him "on numerous occasions," and saw his car in the club's parking lot. The district court noted that, according to an affidavit by Caming's counsel, the club's owner "was also a target of the investigation."

Since the use of the parking lot was limited to club members, "in order to avoid detection and not arouse suspicion," the agents, in two automobiles, "staked out positions on side streets outside the club." When Caming drove out of the parking lot, the agents "pulled our cars out" and blocked Caming's car approximately 100 feet from the parking lot exit.

The agents ordered Caming out of the car and arrested him. A search of the automobile disclosed various financial documents, business records and other items, located on the front seat, in the

glove compartment, and inside the driver's sun visor. The next day, during an inventory of the automobile, additional documents were discovered under the front passenger seat and in the trunk. The prosecution introduced some of these items into evidence.

B. In denying the motion to suppress, the district court announced and applied the following legal standard:

> When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle. . . . Where, however, it appears that the search and not the arrest was the real purpose in effecting a warrantless search of the premises, "and that the arrest was a pretext for or at most an incident of the search," the search is unreasonable under the Fourth Amendment. [Citations omitted.]

The court ruled that Caming

> presents no evidence that the Agents contrived to arrest defendant in his car so as to conduct a pretextual warrantless search of the vehicle. Here, the Agents surveilled defendant's Manhattan apartment building for three and one-half hours, from 5:00 a.m. to 8:30 a.m., in an attempt to arrest defendant as he exited the building. Only when this attempt proved unsuccessful did the Agents search for defendant elsewhere. [Footnote omitted.]

The court stated that "the record indicates no improper purpose" in the agents having "waited for defendant to enter his car and begin to drive away" from the athletic club. "Special Agent Pinzino stated that the agents' motivation was 'to avoid detection and not arouse suspicion.'"

The court then stated

> In light of the circumstances of the arrest, which occurred between 10:00 a.m. and 10:30 a.m. on a business

> day, and defendant's statement that the Club's parking lot holds "about 150 cars," Caming Aff. P 3, Special Agent Pinzino's explanation is entirely credible. Common sense dictates that on a morning during the work-week, a tennis club parking lot is not apt to be full since the majority of patrons would normally be engaged in their regular employment; more likely, such a lot would be closer to empty. The Court accordingly finds that since Arnold Marshel, the Club's owner, was apparently a target of the investigation, the Special Agents' decision not to stake out positions within the Club's parking lot, where their presence would likely be conspicuous, and to arrest defendant as he exited the Club's parking lot, indicates nothing more than Agents' sound exercise of judgment in the execution of an arrest warrant.

The record fails to suggest that the Agents, by deliberately waiting to arrest defendant as he exited the Club, improperly manipulated the situation in order to conduct a search of defendant's vehicle.

C. We agree with the district court that Caming has not shown that his arrest was a pretext to enable the agents to search his car. As the district court noted, the agents originally intended to arrest Caming when he left his apartment house. It was only after waiting three-and-a-half hours that they discovered his car was not in the apartment house garage. The agents' decision not to wait for him in the club's parking lot where, at that time of day, they would have been conspicuous and could have alerted the club owner, who apparently was also under investigation, was reasonable. The agents quickly stopped Caming's car as soon as it had left the parking lot and immediately executed the arrest warrant.

Indeed, if the agents' purpose in arresting Caming had been to seek evidence, presumably they would have arrested him earlier in the morning at his apartment. That was a much more likely place for him to have kept records relating to his currency structuring activities than the glove compartment, seat, or visor of his

automobile.

The affidavits Caming submitted in opposition to agent Pinzino's detailed affidavit did not create a dispute over any material fact that required the district court to hold a hearing before denying the motion to suppress. The defense affidavits did not deny or refute the allegations in Pinzino's affidavit and, as we hold, those allegations refuted Caming's claim that the arrest was a pretext for searching the car for evidence. Moreover, the factual issues which, according to Caming's brief in this court, he raised in the district court, the resolution of which he contends required a hearing--such as "whether the agents anticipated arresting defendant in his car pursuant to the arrest warrant they had obtained," and "whether the agents had an opportunity to apply for a search warrant prior to the arrest and search--" were irrelevant to the question the district court decided: that the arrest was not pretextual.

III

Caming contends that the district court violated his Sixth Amendment rights and thereby denied him a fair trial by improperly limiting the cross-examination of two witnesses and quashing a subpoena to a third witness.

A. Agent Pinzino was a major government witness. Caming cross-examined him vigorously and extensively regarding all aspects of his investigation of Caming. The district court, however, sustained an objection to questions regarding Pinzino's private law practice.

At a side bar conference, Caming's counsel stated: "I have information that Mr. Pinzino has a private law practice and has represented clients in criminal cases and that some of his actions in that regard might be in violation of his responsibilities as an Internal Revenue agent, and, further, may place him in conflict of interest with his duties as agent. If that is so, the jury is entitled to know." He asserted that these issues related to Pinzino's credibility. The prosecutor stated that: "Pinzino is in conformity

with all IRS regulations and all of his outside legal activities have been specifically authorized by the Internal Revenue Service." Caming's counsel stated that Pinzino did not represent "anyone involved in this case in any way." The district court adhered to its sustaining of the objection.

The district court permitted Caming to ask Pinzino: "did you ever receive any awards or commendations in connection with your performance in this case?" The court sustained an objection to the question: "Mr. Pinzino, one of the results of your investigation was that you were able to seize more than $ 600,000 of Mr. Caming's money, is that right?", struck the question from the record and told the jury to disregard it.

"The scope and extent of cross-examination are generally within the sound discretion of the trial court." *United States v. Pedroza*, 750 F.2d 187, 195 (2d Cir. 1984). "The decision of the trial court to restrict cross-examination will not be reversed on appeal unless its broad discretion has been abused." *United States v. Maldonado-Rivera*, 922 F.2d 934, 956 (2d Cir. 1990), *cert. denied*, 111 St. Ct. 2858 (1991). "Cross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a 'discriminating appraisal' of the particular witness's credibility." *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1397 (1991) (*quoting United States v. Singh*, 628 F.2d 758, 763 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980)).

The district court did not abuse its discretion in barring cross-examination of Pinzino on these two issues. The court permitted extensive cross-examination of the witness and Caming's challenges to Pinzino's credibility were thoroughly developed. The additional points on which Caming sought to cross-examine were of marginal relevance, at best, and their exclusion did not prejudice Caming's defense or deny him a fair trial.

B. Carter, an assistant branch manager for the Bank of New York branch where Caming made the majority of his deposits, testified about a conversation that he had with Caming and his own

investigation of some of Caming's structured deposits. He also testified that three signs warning customers of the structuring laws were posted at the branch, and that one such sign was shown in a surveillance photograph that depicted Caming looking at the sign.

The defense extensively cross-examined Carter. This included questions concerning Carter's meetings with the prosecutors, the fact that Carter had been instructed by his superiors to cooperate with the prosecutors on the case, and whether Carter spoke with the Bank's lawyers following his direct testimony.

The court sustained objections to two defense questions: whether Carter had been "instructed by someone at the bank that you should not agree to be interviewed by defense?", and whether he "understood that you were not to cooperate in any way with the defense?" Caming contends that those questions were proper to show Carter's alleged bias against Caming.

The district court did not abuse its discretion in barring those questions. If someone at the bank had told Carter not to be interviewed by defense counsel or indicated that he should not cooperate with the defense, that would hardly show that Carter was biased against Caming. Moreover, Carter already had been questioned whether he had been instructed to cooperate with the prosecution, whether he had spoken with the prosecution before his testimony, and whether he had spoken to the bank's lawyers after his direct testimony. Despite the denial of cross-examination on the two points, the jury still was "in possession of facts sufficient to make a 'discriminating appraisal' of Carter's credibility." *Roldan-Zapata*, 916 F.2d at 806. There was no improper curtailment of the cross-examination of Carter.

C. Caming subpoenaed Ann Schwab, a lawyer for the Bank of New York, who represented the bank employees whom the government and the defense had subpoenaed-- apparently to question her about the bank's alleged bias against Caming and the signs posted in the bank's branch office. After Ms. Schwab told the court that she "knows nothing about the underlying transactions," had "no personal knowledge of any of the underlying

facts" and can't testify to the bank's procedures because I don't know them myself," the court quashed the subpoena.

The district court did not abuse its discretion in doing so. Determinations of relevance and materiality are entrusted to the sound discretion of the trial judge. *United States v. Ebner*, 782 F.2d 1120, 1126 (2d Cir. 1986); *United States v. Sindona*, 636 F.2d 792, 800 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). "Because the trial judge is in a superior position to evaluate the likely impact of the evidence, side he sees the witnesses, the parties, the jurors, and the attorneys, and their mannerisms and reactions, [this court] will not overturn his evidentiary rulings unless he acted arbitrarily or irrationally." *United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985).

Caming's allegations that he wished further to explore the Bank's alleged bias by calling the Bank's lawyer fall far short of showing that "'there is a reasonable likelihood that [Schwab's] testimony could have affected the judgment of the trier of fact.'" *United States v. Champegnie*, 925 F.2d 54, 56 (2d Cir. 1991) (*quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982)). That was the only ground on which Caming originally sought to subpoena Ms. Schwab. Although he subsequently indicated that he wanted to question her about the signs in the bank, she had stated that she could not testify about "the bank's procedures because don't know them myself." The quashing of the subpoena to Ms. Schwab did not deny Caming a fair trial.

IV

Under 31 U.S.C. § 5313(a) (1988) and the implementing regulations (31 C.F.R. § 103.22(a)(1) (1991)), banks are required to report all currency transactions involving more than $ 10,000. Section 5324 of Title 31 provides that:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction--

* * *

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

A person who "willfully violates" this provision commits a crime. 31 U.S.C. § 5322 (1988).

In *United States v. Scanio*, 900 F.2d 485 (2d Cir. 1990), this court rejected the contention that "in order to impose criminal liability for structuring a currency transaction, the government was required to show that [the defendant] was actually aware that structuring is illegal." *Id.* at 486. It ruled: "By its plain language, § 5324(3) is violated when an individual structures a currency transaction with the intent to evade § 5313's reporting requirements." *Id.* at 489. "[A] criminal violation of § 5324(3) may be established without proof that the defendant knew that structuring is unlawful. . . ." *Id.* at 491.

The court distinguished its prior cases holding that the crime of willfully transporting more than $ 10,000 in monetary instruments into or out of the United States without having filed certain reports (31 U.S.C. § 5316) requires "both the defendant's actual or probable knowledge of the reporting requirement and the defendant's intention to commit the crime," *id.* at 489, on the following grounds:

> The requirement that a defendant be actually or probably aware of a reporting obligation before liability may attach for failure to file stems from the view that "the primary purpose of law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the 'violators.'" *United States v. Mancuso*, 420 F.2d 556, 559 (2d. Cir. 1970).

* * *

> In the present case, however, Scanio was not prosecuted for having failed to comply with an obscure reporting requirement; he was charged with having intentionally structured a currency transaction with the explicit purpose of evading what he knew to be the bank's legal duty to file CTRs for all transactions exceeding $ 10,000. Scanio engaged in affirmative conduct and demonstrated an awareness of the legal framework relative to currency transactions which, it is reasonable to conclude, should have alerted him to the consequences of his conduct.
>
> * * *
>
> Unlike § 5316 which requires individuals to report otherwise innocent transactions, § 5324(3) prohibits purposeful conduct aimed at defeating the government's right to information. Where a defendant is charged with violating an obscure reporting provision, proof that she was specifically aware of the reporting provision is necessary to establish criminal intent. With respect to a prosecution for structuring, however, the requirement that a defendant be shown to have acted with a "bad purpose" is satisfied by proof that she (1) knew that the bank was legally obligated to report currency transactions exceeding $ 10,000 and (2) intended to deprive the government of information to which it is entitled. *Id.* at 490-91.

The court further held that its ruling that "a criminal violation of § 5324(3) may be established without proof that the defendant knew that structuring is unlawful effectuates Congress's clear intent as is shown by the legislative history surrounding the anti-structuring provision. . . . With respect to the applicable *mens rea*, the legislative history indicates that Congress only intended to require proof that the defendant structured a currency transaction in order to prevent the financial institution from filing a CTR. . . . In light of this legislative history, we decline Scanio's invitation that we impose, as an additional constraint upon

the use of § 5324(3), the requirement that the government prove that the defendant had actual knowledge that structuring is unlawful." *Id.* at 491.

Since *Scanio*, at least four other circuits have agreed with and followed that decision. *United States v. Rogers*, 962 F.2d 342, 343-345 (4th Cir. 1992); *United States v. Brown*, 954 F.2d 1563, 1568 (11th Cir. 1992); *United States v. Dashney*, 937 F.2d 532, 538-39 (10th Cir.), *cert. denied*, 112 S. Ct. 402 (1991); *United States v. Hoyland*, 914 F.2d 1125, 1129 (9th Cir. 1990).

The district court charged the jury in accordance with *Scanio*. It refused to give Caming's requested additional charge that the government also was required to prove "that the defendant knew that his structuring of these currency transactions was unlawful." The court instructed that "you do not need to find that the defendant knew that structuring was unlawful in order to find that he acted knowingly and willfully for the purposes of this element."

A. Caming argues that *Scanio* was decided incorrectly and urges us to reconsider and reverse it. The arguments he makes, however, basically are those that the court considered and rejected in *Scanio*. *Scanio* was a detailed opinion that carefully and convincingly addressed the issue. We are not disposed to reconsider that recent decision, which several courts of appeals have followed. *See particularly Dashney*, 937 F.2d at 537-539, where the 10th Circuit in following *Scanio* discussed the legislative history of the currency structuring statute in greater detail than we did in *Scanio*, but was "not persuaded that the legislative history as a whole impels a construction of the statutes in the restrictive manner which Dashney suggests." *Id.* at 538.

B. Caming urges, however, that the Supreme court decision in *Cheek v. United States*, 111 S. Ct. 604 (1991), rendered after *Scanio*, so undermines *Scanio* as to require its reconsideration.

Cheek involved criminal convictions for willfully failing to file federal income tax returns and willfully attempting to evade income

taxes. Cheek was a tax protester and his defense was that he "sincerely believed that the tax laws were being unconstitutionally enforced and that his actions during the 1980-1986 period were lawful. He therefore argued that he had acted without the willfulness required for conviction of the various offenses with which he was charged." *Id.* at 607.

The district court instructed the jury that "'an honest but unreasonable belief is not a defense and does not negate willfulness,'" and that "'advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.'" *Id.* at 608. The court of appeals for the seventh circuit affirmed the conviction, agreeing with the district court that "only an objectively reasonable misunderstanding of the law negates the statutory willfulness requirement." *Id.* at 608.

The Supreme Court reversed. It held that the instruction improperly interpreted the willfulness element of the criminal tax provisions involved by imposing the requirement that a defendant's belief must not only be honest, but objectively reasonable.

The Court pointed out that almost 60 years ago, it had "interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule" that "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Id.* at 609. It explained that "special treatment of criminal tax offenses is largely due to the complexity of the tax laws." *Id.* at 609. The Court stated that its prior decisions "conclusively establish that the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'" *Id.* at 610.

Caming apparently reads *Cheek* broadly as holding that in crimes involving willfulness, the government is required to prove that the defendant was aware of the illegality of his actions. *Cheek* announced no such broad principle. The opinion deals with the

meaning of willfulness in federal criminal tax cases; no less than five times is the discussion specifically related to such cases.

Three courts of appeals have held *Cheek* inapplicable to the currency structuring offense here involved and have refused to read *Cheek* as undermining the *Scanio* holding that willfulness under the currency structuring law is established by proof that the defendant was aware of the financial institution's obligation to report currency transactions of more than $ 10,000 and does not require the government also to show that the defendant knew that structuring is illegal. *United States v. Dashney*, 937 F.2d at 540; *United States v. Brown*, 954 F.2d at 1569 n.2.; *United States v. Rogers*, 962 F.2d at 344. In *Dashney*, the 10th circuit stated:

Dashney argues that the complexity of the statutes governing the reporting of monetary transactions is equal to that of the tax statutes and, thus, a similar exception to the general rule should be made in interpreting these reporting statutes. We disagree. *Cheek* involves only certain criminal tax statutes, and we see no reason to extend similar statutory interpretation into the straightforward currency reporting requirements. 937 F.2d at 540.

Other circuits also have repeatedly refused to apply *Cheek* to the willfulness element of non-tax criminal statutes. *See, e.g., United States v. Chaney*, 964 F.2d 437, 453-454 (5th Cir. 1992) (making false statements on bank records); *United States v. Gay*, 967 F.2d 322 (9th Cir. 1992) (mail and property fraud); *United States v. Donovan*, No. 91-1574, ___F.2d___, ___, 1992 WL 18217 at *3, 1992 U.S. App. LEXIS 1535, at *4 (1st Cir. Feb. 6, 1992) (violation of currency transaction reporting requirements by bank officer).

In sum, like the fourth, tenth, and eleventh circuits, we decline to read *Cheek* as undermining our holding in *Scanio*.

V.

Finally, Caming challenges the correctness of his sentence under the Sentencing Guidelines on two grounds.

A. In calculating Caming's sentence, the district court determined that under the Guidelines, Caming's base level was 13. Caming contends that his base level should have been 5.

Section 2S1.3 of the Guidelines provides:

(a) Base Offense Level:

(1) 13, if the defendant:

(A) structured transactions to evade reporting requirements; or

(B) made false statements to conceal or disguise the evasion of reporting requirements; or

(C) reasonably should have believed that the funds were criminally derived property;

(2) 5, otherwise.

The Commentary to this section states:

> A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise his activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Caming contends that level 13 was intended to cover only those currency structuring transactions that involve illegally derived funds, and that level 5 is the proper level when there is no

evidence that the funds involved were so derived. Caming is incorrect.

Guidelines Section 2S1.3 provides for a base offense level of 13 if the defendant "structured transactions to evade reporting requirements." That is precisely what Caming was charged with and convicted of in this case. The language of the Guideline is broad and unqualified and does not support the limitation that Caming would impose upon it.

The Commentary that level 13 covers an offense where the defendant "reasonably should have believed that the funds were criminally derived property" provides an alternative basis for a level 13 base offense. It is not a condition to the first situation in which the commentary prescribes level 13: "where the defendant either structured the transaction to evade reporting requirements."

Caming's offense in this case involved the structuring of more than $ 700,000 in more than 80 cash transactions. It is a far cry from the type of case to which the commission anticipated level 5 would apply: "simple record-keeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources." Indeed, there is no evidence in this record that Caming "reasonably believed that the funds at issue emanated from legitimate sources."

The district court correctly determined that Caming's base offense level was 13.

B. Caming argues that the district court erroneously refused to make a downward departure from the Guidelines based on Caming's wife's medical condition and his ties to and responsibilities for her. In rejecting such a downward departure, the district court stated:

> So far as a downward procedure based on the condition of the defendant's wife, I have heard about the defendant's wife prior to this. This is a longstanding situation. I am

> very sorry that that is the case, but I think the kind of conduct that this man was involved in, I cannot consider a downward departure.

"A decision not to depart downward from the applicable Guidelines range is not appealable when the Guidelines provision was correctly applied and the sentence is not in violation of the law. An appeal may be heard, however, when a refusal to depart is based on a mistaken view that the Sentencing Commission precluded the departure in question." *United States v. Richardson*, 923 F.2d 13, 15 (2d Cir. 1991) (citation omitted).

We do not read the district court's statement that "I think the kind of conduct that this man was involved in, I cannot consider a downward departure," as reflecting the view that the court lacked authority so to depart. Rather, we think the court concluded that, in view of the seriousness of Caming's offense, it would be inappropriate to depart in this case. Shortly before refusing to depart, the court, in holding that level 13, rather than level 5, was the proper base level for the offense, pointed out: "There was a tremendous amount of money involved here, $ 725,000 in cash deposits in over 100 separate transactions."

Accordingly, the district court's refusal to make a downward departure is not reviewable.

The judgment of the district court is affirmed.

UNITED STATES OF AMERICA

-against-

STANLEY CAMING, Defendant

No. 90 Cr. 556 (SWK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

756 F. Supp. 121

January 15, 1991
January 15, 1991, Filed

For the Government: OTTO G. OBERMAIER, UNITED STATES ATTORNEY, for the Southern District of New York, By: Steven M. Witzel, Assistant U.S. Attorney.

For the Defendant: Cutner & Rathkopf, New York City, By: David A. Cutner.

SHIRLEY WOHL KRAM, UNITED STATES DISTRICT JUDGE:

On August 27, 1990, defendant Stanley Caming was charged in a two-count indictment with structuring financial transactions in violation of Title 31 U.S.C. § 5324. Defendant now moves to suppress evidence seized from his automobile at the time of his arrest as well as a post-arrest statement made prior to advice of his Miranda rights. Defendant also moves for production of hand written notes of post-arrest statements.

BACKGROUND

In February 1989, the Department of the Treasury, Internal Revenue Service ("IRS") commenced a year-long investigation of

defendant's involvement in illegal money structuring transactions. The investigation involved review of voluminous financial records, interviews with bank officials and extensive surveillance of defendant. On March 30, 1990, a United States Magistrate issued a warrant for defendant's arrest. Special Agent Pinzino, the agent in charge of the investigation, arranged to arrest defendant on the morning of April 2, 1990. Affidavit of Stephen D. Pinzino, sworn to December 14, 1990 ("Pinzino Aff.") para. 5.

On April 2, at approximately 5:00 a.m., Special Agent Pinzino met IRS Special Agents Carroll, Cunningham and Bento outside defendant's apartment building on East 27th Street in Manhattan. For reasons of safety and out of consideration for the health of defendant's wife, whom the Agents had previously observed to appear frail and in poor health, the Agents decided to arrest the defendant as he exited his apartment building. *Id.* at para. 6.

After waiting three and one-half hours, the Agents had not observed defendant emerge from the building. At 8:30 a.m., the Agents checked the building's garage and discovered that defendant's car was not there. The Agents proceeded to a factory building on West 25th Street in Manhattan where they had previously observed defendant. They were unable to locate defendant or his car there.

The Agents then proceeded down the west side of Manhattan to the Paerdegat Athletic Club in Brooklyn, where they had observed defendant on numerous occasions. Arriving at the Club at 9:30 a.m., the Agents spotted defendant's car in the Club's parking lot. In order to avoid detection or arouse suspicion,[1] the Agents staked out positions on side streets outside the Club from which they could observe the Club's parking lot exit. *Id.* at para. 10. At approximately 10:30 a.m., the Agents observed defendant's car leaving the Club. After the car had travelled approximately 100 feet from the parking lot exit, the Agents blocked defendant's car

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[1] According to defendant's counsel, Arnold Marshel, the Club's owner, was also a target of the investigation. See Affidavit of David A. Cutner, Esq., sworn to on November 30, 1990, at para. 3.

with their own.

Three Agents exited their cars; Special Agent Bento, remained in his car. The Agents were all wearing jackets with large yellow letters and yellow badges emblazoned on the jackets, identifying them as United States Treasury Agents. Pinzino Aff. para. 12. Special Agent Pinzino approached defendant's car, "identified [himself] as an IRS agent, told defendant that [they] had a warrant for his arrest and ordered defendant out of his car." *Id.* Defendant stated "I'm dead," or "I'm a dead man." Affidavit of Stanley Caming, sworn to September 29, 1990 ("Caming Aff.") para. 5; Pinzino Aff. para. 13. Shortly thereafter, Special Agent Cunningham handcuffed defendant and advised him of his *Miranda* rights. Caming Aff. para. 6.

At the time of defendant's arrest, Special Agent Pinzino conducted a search of the interior of defendant's automobile and found on the front seat, in the glove compartment and inside the driver's side sun visor, the following documents:

. 4 Dreyfuss Fund customer receipts in the name of Jacqueline Gottleib

. Phone Message for Jacqueline Gottleib

. 2 Con Edison electricity bills for Bench-n-Gavel Restaurant

. Chemical Bank monthly statement for account of David Flanders

. Certified Mail receipt for Dr. Phillip Hodes

. Bill of Sale for a camcorder

. Receipt of delivery from Shephard's Distributor and Sales Corp to Key Sales

. Dreyfuss Fund customer receipt in the name of Mr. & Mrs. Gilbert

. Dreyfuss Fund customer receipt in the name of Mr. & Mrs. Shaw

. Various personal papers with numerical configurations, lists of things to do, and circle diagrams.

Affidavit of David Cutner, Esq., sworn to on November 30, 1990, at para. 5. On the day following the arrest, Special Agent Pinzino conducted an inventory search of defendant's vehicle and recovered additional documents from under the passenger side floor mat and the car's trunk. Pinzino Aff. para. 16.

Defendant now moves, pursuant to Federal Rules of Criminal Procedure 12 and 41, to suppress the documentary evidence seized from his car at the time of his arrest and during the inventory search, as well as the post-arrest statement made prior to being advised of his Miranda rights.[2] Defendant also moves, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A), for production of the Agents' handwritten notes of defendant's post-arrest statements.

DISCUSSION

I. Motion to Suppress

A. Search of Defendant's Vehicle

Defendant contends that the evidence seized from his automobile during and subsequent to his arrest must be suppressed since "the

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[2] Initially, defendant did not request a hearing. By letter to the Court dated January 8, 1991, defendant requested an evidentiary hearing on his suppression motions. By letter dated January 9, 1991, the government opposed this request, asserting that defendant had not presented sufficient evidentiary facts to create material issues of fact requiring an evidentiary hearing. Since the Court finds that the material facts are not in dispute, an evidentiary hearing is unnecessary. *See United States v. Evans*, 572 F.2d 455 (5th Cir.), *reh'g denied*, 576 F.2d 931, *cert. denied*, 439 U.S. 870, 58 L. Ed. 2d 182, 99 S. Ct. 200 (1978); *United States v. Hickok*, 481 F.2d 377 (9th Cir. 1973).

agents used defendant's arrest as a pretext for [a] warrantless search, apparently hoping that it could be justified under the 'search incident to a lawful arrest' exception to the warrant requirement."

When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle. *See New York v. Belton*, 453 U.S. 454, 460, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981); *see also Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) (lawful custodial arrest justifies contemporaneous warrantless search of immediately surrounding area). Where, however, it appears that the search and not the arrest was the real purpose in effecting a warrantless search of the premises, "and that the arrest was a pretext for or at most an incident of the search," the search is unreasonable under the Fourth Amendment. *United States v. Sohnen*, 298 F. Supp. 51, 56 (E.D.N.Y. 1969) (*quoting Henderson v. United States*, 12 F.2d 528, 531 (4th Cir. 1926)); *see United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877, 52 S. Ct. 420 (1932); *McKnight v. United States*, 87 App. D.C. 151, 183 F.2d 977, 978 (D.C. Cir. 1950).

In *Sohnen*, relied upon by defendant, United States Customs agents were investigating a defendant in connection with the illegal importation and possession of gold coins without a license. After observing defendant collecting his foreign mail on several occasions, the defendant was observed picking up a package from his post office box. The Customs agents observed the defendant leave the post office and drive off. By the time the Customs agents reached their own car, defendant was out of sight. The Customs agents drove directly to the defendant's apartment, placed defendant under arrest and advised him of his constitutional rights. The Customs agents told the defendant that they would search the entire apartment unless he revealed where his coins were kept.

The defendant showed the Customs agents a small room and handed the Customs agents the package which he had just picked up from the post office. The Customs agents searched the room

and seized a large quantity of gold coins, and records and receipts of gold coin transactions. After completing the search, the agents left the defendant but took the coins and records. The agent who conducted the search of the defendant's apartment testified that he had decided to arrest the defendant when he observed the defendant pick up the package at the post office but explained that he "planned to follow the defendant in one last attempt to determine what the defendant was doing with the coins, but lost sight of him. . . ." *Sohnen*, 298 F. Supp. at 57.

Considering all these circumstances, the court found that the purpose of the arrest was to conduct an exploratory search for evidence rather than to apprehend the petitioner. *Id.* The court rejected the agent's explanation that he had lost sight of the defendant, observing that the agent could have "made the arrest in the post office or on the adjacent sidewalk. . . ." *Id.* In reaching its conclusion that the arrest was a pretext for the warrantless search, the court relied upon the Customs agents' immediate demand to search upon gaining entrance to the apartment, their proceeding to search even after the defendant handed over the package he had picked up at the post office and their failure to take the defendant into custody. *Id.*

The circumstances here are materially different from those present in *Sohnen*. Defendant presents no evidence that the Agents contrived to arrest defendant in his car so as to conduct a pretextual warrantless search of the vehicle. Here, the Agents surveilled defendant's Manhattan apartment building for three and one-half hours, from 5:00 a.m. to 8:30 a.m., in an attempt to arrest defendant as he exited the building.[3] Only when this attempt proved unsuccessful did the Agents search for defendant elsewhere, ultimately locating him at the Paerdegat Athletic Club. The Court therefore finds that the Agents contemplated neither an

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[3] Evidence that the Agents waited until Monday, April 2, to arrest defendant based on a warrant issued during the late afternoon on the preceding Friday, does little toward establishing a "pretextual" arrest. *See United States v. Barbanell*, 231 F. Supp. 200 (S.D.N.Y. 1964) (weekend-long delay in executing arrest warrant not unreasonable).

arrest of defendant in his car, nor a search of the car, when setting out to arrest him.

The Agents staked out positions outside the athletic club and arrested defendant as he drove his car from the club's parking lot. Although the Agents concede having waited for defendant to enter his car and begin to drive away, the record indicates no improper purpose in doing so. Special Agent Pinzino stated that the Agents' motivation was "to avoid detection and not arouse suspicion." Pinzino Aff. para. 10.

In light of the circumstances of the arrest, which occurred between 10:00 a.m. and 10:30 a.m. on a business day, and defendant's statement that the Club's parking lot holds "about 150 cars," Caming Aff. para. 3, Special Agent Pinzino's explanation is entirely credible. Common sense dictates that on a morning during the work-week, a tennis club parking lot is not apt to be full since the majority of patrons would normally be engaged in their regular employment; more likely, such a lot would be closer to empty. The Court accordingly finds that since Arnold Marshel, the Club's owner, was apparently a target of the investigation, the Special Agents' decision not to stake out positions within the Club's parking lot, where their presence would likely be conspicuous, and to arrest defendant as he exited the Club's parking lot, indicates nothing more than Agents' sound exercise of judgment in the execution of an arrest warrant.

The record fails to suggest that the Agents, by deliberately waiting to arrest defendant as he exited the Club, improperly manipulated the situation in order to conduct a search of defendant's vehicle. Rather than present evidence indicating that the arrest was "pretextual" or merely "an incident of the search," so as to fall within the rationale of *Sohnen*, the record indicates that the Agents made a concerted effort to arrest defendant "in an open area . . . alone, outside his apartment building." Pinzino Aff. para. 6. The circumstances thus fail to indicate that the arrest was a mere pretext for a search. *See United States v. Barbanell*, 231 F. Supp. 200 (S.D.N.Y. 1964) (testimony that agents would have arrested defendant as he walked down street indicated that

delay in arrest was not pretext for search).

B. The Inventory Search

Routine inventory searches of vehicles lawfully impounded by police are reasonable under the Fourth Amendment. *Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1 (1990). The validity of such searches is not limited to situations where impoundment is pursuant to a forfeiture statute. *South Dakota v. Opperman*, 428 U.S. 364, 369, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 (1976).

Defendant has not suggested any impropriety in the execution of the inventory search itself. He argues rather that since the initial search of his car was improper, the subsequent inventory search was also improper.[4] Accordingly, having conducted a lawful search of the vehicle incident to defendant's arrest, the Agents properly impounded defendant's vehicle and conducted an search of its contents. *Opperman*, 428 U.S. at 369.

C. Post-Arrest Statement

Defendant moves for suppression of his post-arrest statement "I'm dead," made to the Agents immediately prior to their advising defendant of his *Miranda* rights. Defendant argues that the Agents' failure to advise him of the reasons for his arrest mandates suppression of the post-arrest statement. Defendant admits, however, that his statement was spontaneous and made immediately after the Agents advised that he was being placed under arrest, before the Agents had initiated any interrogation. *See* Caming Aff. para. 5. The record is clear that at the time of the statement, defendant understood that he had been placed under

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[4] Anticipating that the government would justify the inventory search on the ground that the vehicle was subject to forfeiture, defendant contends that his vehicle was subject neither to forfeiture nor to the subsequent inventory search. Defendant's Memorandum at 9-12. The government, however, raises no such forfeiture claim and the Court does not reach this argument.

arrest. *Id.* None of the inherently compelling circumstances of station-house interrogation were present and there is no evidence of coercion or deception. The Court finds that defendant's statement was voluntary and spontaneous. Accordingly, it shall not be suppressed. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); *United States v. Vigo*, 487 F.2d 295 (2d Cir. 1973).

The Court rejects defendant's argument that the Agents' alleged failure to advise defendant of the reason for his arrest, in violation of IRS internal procedures,[5] mandates suppression. Defendant concedes that his statement was made not in response to custodial interrogation but was made spontaneously before the Agents had administered the *Miranda* warnings. The Agents' resulting inability to initiate or complete advice of the *Miranda* warnings is irrelevant to a determination of whether defendant's post-arrest statement should be suppressed. *See Miranda*, 384 U.S. at 444-45. The Court defers until the time of trial a determination of defendant's argument that the post-arrest statement in issue is irrelevant and unfairly prejudicial, and should therefore be excluded under Federal Rules of Evidence 402 and 403. *See* Fed. R. Crim. P. 12(e).

II. Motion for Production of Handwritten Notes

Defendant moves for the production of the Agents' handwritten notes which form the basis for a typewritten memorandum of arrest which has been turned over to defendant. The Federal Rules of Criminal Procedure provide, in relevant part:

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[5] Internal Revenue Manual, Part IX - Criminal Investigation, Special Enforcement Procedure @ 9443(2) provides:

> When making an arrest, the special agent should announce his/her official identity to the person to be arrested, should display his/her badge or pocket commission where circumstances permit, should make known to the offender that he/she is being arrested, should inform the offender of the reason for such action, and should take control of the arrested person

> the government shall permit the defendant to inspect and copy . . . the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent.

Fed. R. Crim. P. 16(a)(1)(A). Here, the government has, at present, fully complied with Rule 16(a)(1)(A) by providing defendant with the typewritten memoranda of his statements prepared from the Agents' handwritten notes. *See United States v. Koskerides*, 877 F.2d 1129, 1133 (2d Cir. 1989); *United States v. Elusma*, 849 F.2d 76, 79 (2d Cir. 1988), *cert. denied*, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 936 (1989). Defendant's request for an in camera viewing of the handwritten notes is premature as the case has yet to proceed to trial. *See* 18 U.S.C. § 3500; *Koskerides*, 877 F.2d at 1133-34; *United States v. Sanchez*, 635 F.2d 47, 64-65, n. 18 (2d Cir. 1980).

CONCLUSION

For the reasons set forth above, defendant's motions for suppression of physical evidence and a post-arrest statement, and for production of handwritten notes of defendant's post-arrest statement are denied.

SO ORDERED.